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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

To: The Commission

COMMENTS OF BOGUE, KANSAS

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TABLE OF CONTENTS

Summary

The City of Bogue, Kansas disagrees with the Commission's conclusion that it is appropriate to infer that Congress intended the Commission to preempt local regulation of intrastate interconnection issues at 47 U.S.C. §§ 251, 252. Notice of Proposed Rulemaking (NPRM), para. 37. The Supreme Court has determined that 47 U.S.C. § 152(b) establishes a dual regulatory scheme under which the States regulate intrastate telecommunications matters and the Commission regulates interstate telecommunications matters. Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986). Moreover, the Constitution requires that when Congress intends to preempt a state that Congress "plainly state" that intent. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). In view of the Supreme Court's 1986 holding in Louisiana Public Service Commission, and in view of the "plain statement" requirement, the Commission's inference that Congress intended preemption is insupportable.

If it is determined that preemption is appropriate, Bogue requests that the Commission promulgate regulations which protect rural communities as required by 47 U.S.C. § 251(f)(1). Bogue, and other rural communities, have marginal population bases which makes it extremely risky for a company to invest significant sums of money to improve service. No telephone exchange company, in any part of the country, will take that investment risk if the exchange company must provide wholesale resale rates to each and every competitor or if there is a threat that a large company might over

build the market to force out a smaller company which had recently invested significant sums of money in network upgrades.

Absent an assurance that an investment in a rural community will be protected from unduly economically burdensome competition, it is most likely that rural communities will have to suffer inferior telecommunications services because of the huge investment risk associated with improving service in economically marginal areas. Absent such assurance, the rural communities of the country will be relegated to early 20th Century technology while the rest of the country enjoys the economic fruits borne by advanced telecommunications systems.

Fortunately, Congress passed 47 U.S.C. § 251(f) which is designed to protect local telephone exchange investments in rural areas. Bogue recommends that the Commission promulgate a regulation which is designed to provide some assurance that investments in rural areas will not be subject to unduly economically burdensome competition. Specifically, Bogue recommends that the Commission adopt a regulation which contains a presumption that communities with fewer than 10,000 inhabitants are considered "rural" and that local exchange competition in rural markets is not permitted. A prospective service provider would be able to rebut this presumption at a hearing before the appropriate state or local regulatory authority.

Introduction

The City of Bogue, Kansas, by its attorney, hereby submits comments in connection with the Commission's April 19, 1996 Notice of Proposed Rulemaking (NPRM). In support whereof, the following is respectfully submitted:

The Commission Lacks Authority to Preempt Matters Relating To Local Regulation of Intrastate Interconnection

1) At paragraph 37 of the NPRM the Commission states that it

> tentatively conclude[s] that Congress intended sections 251 and 252 to apply to both interstate and intrastate aspects of interconnection, service, and network elements, and thus that our regulations implementing these provisions apply to both aspects as well. It would make little sense, in terms of economics, technology, or jurisdiction, to distinguish between interstate and intrastate components for purposes of sections 251 and 252. Indeed, if the requirements of sections 251 and 252 regarding interconnection, and our regulations thereunder, applied only to interstate interconnection, as might be argued in light of the lack of a specific reference to intrastate service in those sections, states would be free to establish disparate guidelines for intrastate interconnection with no guidance from the 1996 Act. We believe that such a result would be inconsistent with Congress' desire to establish a national policy framework for interconnection and other issues critical to achieving local competition.[1]

2) With all due respect, it appears that the Commission is assuming more jurisdiction over intrastate interconnection issues

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[1] For many years the States and the Federal Government have divided the regulation of intrastate and interstate components of telecommunications despite the fact that the Commission may consider that another arrangement may be economically more beneficial. See e.g. Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986). The fact that the Commission may find that the Federal/State dichotomy is not the best economic arrangement is irrelevant. We are talking about intrastate interconnection and nothing in the Communications Act of 1934, as amended, indicates that Congress has eliminated the States' regulatory concerns about what transpires within their respective borders.

relating to local telephone exchanges than Congress granted in the Telecommunications Act of 1996. Current case law indicates that it is not appropriate to draw an intrastate interconnection preemption inference where the Commission acknowledges that there "is a specific lack of reference" to such a preemption. Moreover, specific language in the Telecommunications Act of 1996 indicates that Congress did not intend to affect a federal preemption of intrastate interconnection issues.

3) The Commission's preliminary determination that 47 U.S.C. § 152(b) has been somehow amended or superseded by 47 U.S.C. §§ 251, 252, despite the "lack of a specific reference to intrastate service," does not accord with case law. NPRM, para. 36. The Supreme Court has held that 47 U.S.C. § 152(b)

> fences off from FCC reach or regulation intrastate matters--indeed, including matters 'in connection with' intrastate service. . . . We agree with petitioners that . . . sections [151 and 152(b)] are naturally reconciled . . . to enact a dual regulatory system . . .. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 370 (1986) (emphasis in original).

The Supreme Court has further determined that 47 U.S.C. § 152(b)

> contains not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction ('[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communications service . . .'"). Louisiana Public Service Commission v. FCC, 476 U.S., at 373.

The Supreme Court has interpreted the "nothing in [the 1934] Act" language found at 47 U.S.C. §152(b) to mean nothing. As the Commission acknowledges, the Telecommunications Act of 1996 does not explicitly change §152(b)'s "nothing" language.

4) The exercise of the commerce power by Congress, U.S. Const. Art. I, § 8, in conjunction with the Supremacy Clause, U.S. Const., Art. VI, cl. 2, "is an extraordinary power in a federal system. It is a power that we must assume Congress does not exercise lightly." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

5) Congress is required to make a "plain statement" that it intends to preempt state regulatory authority over intrastate interconnection issues and thereby alter the preexisting balance of State and Federal power. Gregory v. Ashcroft, 501 U.S., at 461. As the Commission acknowledges, the Telecommunications Act of 1996 does not expressly grant to the Commission jurisdiction over intra-state interconnection issues nor does that Act expressly withdraw such authority from the States. Thus, the Commission's "inference" is too weak a reed upon which it may assume jurisdiction of a intrastate interconnection, a matter long regulated by the States.

6) Significantly, 47 U.S.C. § 251(d)(3) (Preservation of State Access Regulations)[2] requires that

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[2] Numerous Supreme Court cases hold that federal statutes cannot defeat the States' "separate and independent existence[s]," Lane County v. Oregon, 7 Wall. 71, 76 (1869); Coyle v. Oklahoma, 221 U.S. 559, 580 (1911), nor "impair the States' 'ability to structure integral operations in areas of traditional functions.'" Hodel v. Virginia Surface Mining & Recl. Assn., 452 U.S. 264, 287-288 (1982). See also National League of Cities v. Usery, 426 U.S. 833, 852 (1976), over-ruled, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); New York v. United States, 505 U.S. 144, 188 (1992). Even the Garcia Court acknowledged that States "do 'retai[n] a significant measure of sovereign authority.'" 469 U.S., at 549. While the Garcia court does not indicate the "significant measure of sovereign authority" which exists, there is nothing in Garcia which indicates that the Federal Government can order the States to establish or disestablish (continued...)

> the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that . . . establishes access and interconnection obligations of local exchange carriers; . . . is consistent with the requirements of this section; and . . . does not substantially prevent implementation of this section and the purposes of this section.

7) Thus, the Telecommunications Act of 1996 contains a "plain statement" that intrastate interconnection issues remain subject to the jurisdiction of the States. It is significant that 47 U.S.C. § 251(d)(3) requires that local regulation to be consistent with "the requirements of this section." 47 U.S.C. § 251(d)(3) does not indicate that the State regulators are subject to Commission control. 47 U.S.C. § 251(d)(3) indicates that State regulators are to interpret and apply the requirements of the Act.[3]

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[2](...continued)
State and local regulatory offices or decide which State or local agency shall exercise police powers. Thus, when the Telecommunications Act of 1996 refers to "states," it also refers to the political subdivisions thereof to the extent that a State has delegated sovereign power to its political subdivisions.

[3] It is noteworthy that 47 U.S.C. § 251(e) (Numbering Administration) specifically states that "the Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan . . . . Nothing in this paragraph shall preclude the Commission from delegating to State commission's or other entities all or any portion of such jurisdiction." Not only does this provision demonstrate Congress' ability to plainly state a preemption when preemption is desire, it demonstrates that Congress will explicitly state when state regulators are to follow Commission regulations rather than interpret provisions of the Act in the first instance. Bogue notes that on constitutional grounds, it disagrees with the Congressional determination that the Federal Government may delegate regulatory duties to the States. New York v. United States, 505 U.S. 144, 149 (1992).

8) Moreover, 47 U.S.C. § 256(c) is a "plain statement" that the States retain jurisdiction over intrastate interconnection issues. 47 U.S.C. § 256(c) (Coordination For Interconnectivity) expressly states that

> Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996. (Emphasis added.)[4]

9) As discussed above, the Supreme Court determined in 1986 that 47 U.S.C. 152(b) precludes Commission regulation of matters relating to intrastate telecommunications, even where those matter affect interstate telecommunications issues. The radical change in the balance of power in the federal/state dichotomy suggested by the Commission, and universally understood to be expressed at 47 U.S.C. §152(b), requires that Congress "plainly state" such a change in the text of the statute. Gregory v. Ashcroft, 501 U.S., at 461. As the Commission acknowledges, Congress has made no such plain statement.

10) In view of the Supreme Court's holdings in the Louisiana Public Service Commission and in the Gregory v. Ashcroft cases, and in view of the express language at 47 U.S.C. §§ 251(d)(3), 256(c), it is inappropriate to negate any portion of the long standing dual regulatory system established at 47 U.S.C. §152(b) by mere

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[4] The purpose of 47 U.S.C. § 256 is "to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks."

inference. Thus, it must be concluded that jurisdiction over intrastate interconnection issues remains with the States.

Alternatively, If Preemption Authority Exists, The Commission Must Adopt A Rebuttable Presumption That Provision Of Competitive Telephone Exchange Service In Rural Markets Is Not In The Public Interest

11) Bogue has a population of 191. Kansas has 63 cities with fewer than 300 residents, 73 cities with fewer than 500 residents, 81 cities with fewer than 1,000 residents, and 80 cities with fewer than 2,000 residents.

12) For many years Bogue has received very inferior local telephone exchange service.[5] Because of various state imposed regulatory obstacles which were only recently eliminated by the Kansas Supreme Court, Bogue was unable to remove the incumbent local exchange carrier. After the Kansas Supreme Court determined that Kansas law permitted Bogue to expel the inferior incumbent, United Telephone Company of Kansas v. City of Hill City, 899 P.2d 489 (Kan. 1995), Bogue entered into an arrangement with Rural Telephone Service Company, Inc. to install a high quality, underground, fiber optic local exchange network. The projected cost of this project is six million dollars ($6,000,000.00) and is approximately one-half completed.

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[5] Currently, there are more party-line circuits in Bogue than there are private-line circuits. It is not possible to use computers or FAX machines, or other devices requiring a dedicated circuit, over a party-line because another party on the same circuit may pick up his/her phone and destroy the data stream.

13) It is highly doubtful that a carrier would willingly undertake such an expensive undertaking in marginally populated areas absent some assurance that unduly economically burdensome competition will not be permitted to waste the investment. Absent such an assurance, small cities like Bogue, and other rural communities, might be saddled with early 20th Century telephone technology while the rest of America enjoys the many economic benefits of advanced telecommunications systems. Indeed, Rural Telephone Service Company, Inc. most likely would not have commenced installation of an expensive new telephone system in Bogue in 1995 if the risk of capital loss was increased risk by the threat of parties wholesaling/over building its service.

14) Fortunately, Congress' concern about improving telephone service to rural areas is expressed at 47 U.S.C. § 251(f)(1) (Exemption For Certain Rural Telephone Companies). Generally stated, 47 U.S.C. § 251(f)(1) exempts rural telephone companies from the interconnection, resale, etc. requirements of 47 U.S.C. §251(c). 47 U.S.C. § 251(f)(1) provides that the exemption shall expire when the State commission determines that meeting the requirements of 47 U.S.C. § 251(c) are "not unduly economically burdensome."

15) Bogue recommends that minimum standards be established before consideration may be given to a request to provide competing service, either facilities based or through resale. Establishment of minimum standards will reduce the threat of destructive competition and will encourage companies to risk significant sums of

money to improve telephone exchange service to marginally populated areas of the country.

16) Bogue recommends that the Commission adopt an implementing regulation, pursuant to 47 U.S.C. § 251(f)(1), modeled on the following:

> (a) An entity seeking to provide competitive local exchange telephone service pursuant to 47 U.S.C. §251(c) in a rural market, whether through resale, construction of new facilities, or otherwise, shall first file a request with the appropriate state and/or local regulatory authority. The existing local telephone exchange service provider shall be served, by registered mail, with a copy of the request for authority at the time the request is filed.
>
> (b) The obligation of the local exchange telephone company to shall be determined at hearing by the appropriate state and/or regulatory authority, subject to judicial review. The regulatory authority shall act upon the request within 180 days after the application is filed. After the time for filing for judicial review has passed, the filer shall be permitted to engage in authorized activities provided that judicial review of the order of the regulatory authority is not pending.
>
> (c) At hearing there shall be a presumption that a request to provide competing telephone exchange service in a rural market is unduly economically burdensome. A rural market is defined as a community identified by the U.S. Census as having fewer than 10,000 inhabitants. In those instances in which a community is not listed in the U.S. Census, town, city, county, or state clerk or planning commission population figures shall be used.[6]

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[6] It does not appear that 47 U.S.C. § 153 defines the term "rural markets." However, 47 U.S.C. § 153(37) defines a "rural telephone company" as one which, inter alia, does not have a local exchange study area which includes 10,000 or more inhabitants. Bogue suggests that because a study area may be large but include very few people per square mile, that a 10,000 population figure per community be adopted for the purposes of the regulation promulgated pursuant to 47 U.S.C. § 251(f)(1). Unlike the population in a local telephone exchange study area, the population of a community is easily ascertainable through examination of the U.S. Census. Bogue believes that such an interpretation is consistent with (continued...)

(d) the regulatory authority shall consider the following issues in order to determine whether the presumption established in paragraph (c) above has been rebutted by the filer:

1) whether the service currently being provided by the existing local telephone exchange company is adequate and the necessity of the proposed service;

2) whether the proposed service is technically feasible and whether the proposed service would advance telecommunications service to the rural market;

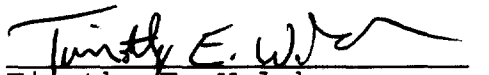
3) whether the provision of competitive service would pose an undue economic burden on consumers or the existing exchange telephone service provider;

4) whether access to proprietary network elements is necessary and whether the failure to provide access to proprietary network elements would impair the ability of the filer to provide the service it seeks to offer;

5) whether, based upon the evidence adduced under the preceding issues, the provision of the proposed service by the filer would be consistent with the public interest, convenience, and necessity.

WHEREFORE, in view of the information presented herein, it is respectfully submitted that the Commission does not have the authority to preempt local regulation of intrastate interconnection issues. However, if it is determined that such preemption authority exists, that the Commission adopt a regulation which protects telephone exchange investments in rural areas.

Respectfully submitted,
CITY OF BOGUE, KANSAS



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[6](...continued)
Congress' intent in establishing protections for rural markets.

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of May 1996 mailed the foregoing Comments of Bogue Kansas by First-Class United States mail, postage prepaid, to the following:

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